IN THE

Supreme Court of the United States

No. 298.

THE FERRIES COMPANY, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

APPEAL FROM THE COURT OF CLAIMS.

REPLY BRIEF OF APPELLANT

MISCONCEPTIONS IN GOVERNMENT'S BRIEF.

The attention of the Court is respectfully invited to the following misconceptions appearing in the Government's brief:

1. On page 4, the Bureau of Industrial Housing and Transportation is referred to as the "succeeding lessee" in the sense of that term as contained in the lease of March 31, 1909. From this the inference is drawn in the Government's brief that appraisal should have been made by a Board selected under the terms of the original lease applicable to an appraisal should there have been a "succeeding lessee." In fact, the Appraisal Board was selected in the manner provided by the terms of the lease of March 31, 1909, applicable to the termination of the lease without there being a "succeeding lessee."

It is respectfully submitted that the Bureau was not a "succeeding lessee" but under the terms of the contract of October 8, 1918, became entitled to the possession of the property in *substitution* for the plaintiff; the *right* to possession being fixed by the contract of October 8, 1918, which contract expressly provided that the lease "should be terminated as of the time that the operation

of said Ferries is taken over by the Bureau," and the *nature* of the possession being left by said contract for adjustment between the owners of the property and the Government, and being referred to in the contract of October 8, 1918, as a taking over by the United States Government of "the operation of the Norfolk County Ferries" (presumably for the account of the owners).

No conclusion is drawn by the Government Counsel from his criticism of the method of selection of the Appraisers, and it is doubted if any effect on the present proceeding would result therefrom, but, nevertheless, the misnomer of the Bureau as a "succeeding lessee" is now called to the attention of the Court.

(2) On page 6, the Government suggests that the claimant has undertaken to recover at law upon an *implied* contract on the part of the United States to pay "just compensation" for property of the claimant appropriated to public use. It is respectfully submitted that the averments of the petition do not justify such a construction, and such a claim is hereby expressly disclaimed by the plaintiff. The plaintiff takes no issue with the authorities cited on page 7 of the Government's brief or to the statements deduced therefrom by Government's counsel, and concurs with Government's counsel that if the plaintiff's claim had been based "upon an implied contract to pay the fair value of the property or upon a taking which was unauthorized or unwarranted in law," the petition should have been properly dismissed for want of jurisdiction. The plaintiff respectfully submits, however, that its claim is based upon an *express* contract with the Government, namely, the contract of October 8, 1918, which contract contains the express agreement of the Government to pay to the plaintiff the fair value of the property *as of the time of taking, namely, October 31, 1918.* (Findings of Fact V.)

(3) On page 11 of its brief, the Government suggests that the provisions of the contract of October 8, 1918, providing that the appraisal shall take place "as of the time that the Ferries shall be taken over by the Bureau" fix "the time of the inventory and appraise-

ment," but are silent "as to the method of the valuation which shall be applied."

It is respectfully submitted that these provisions do not fix the time of the inventory and appraisement, but do fix the time or period to be used in determining the basis of value.

Had the contract sought to fix the time of the appraisal the appropriate language to have been used in Paragraph Second (set forth in Government's brief) would have been "that the appraisal . . . . shall take place *at* the time that the ferries shall be taken over." On the other hand the contract provides "that the appraisal . . . . shall take place *as* of the time that the ferries shall be taken over."

(4) On page 12, the Government contends that there is nothing in the lease of 1909 "to indicate an intention that the lessee should be paid at the termination of the lease for an unearned increment arising out of appreciation in value of the owner's property." The plaintiff excepts to this statement and contends to the contrary, namely, that the original lease expressly provided that both appreciation and depreciation would be determined by an appraisal at the termination of the lease. Furthermore, in the instant case, the contract of October 8, 1918, was made during the prevalence of war conditions and war prices, in full contemplation of the standard of values then prevailing, and was made with reference to compensation in the then depreciated currency (for the Court will take judicial notice that the purchasing power of a dollar on October 8, 1918, was one-half of the purchasing power of a dollar in 1909). This contract of October 8, 1918, thereupon and under the existing conditions expressly recognized and fixed October 31, 1918, as the period to be used in ascertaining value.

The plaintiff contends that the owners were required under the lease of 1909, to buy back their property at its termination, and that the contract of October 8, 1918, recognized this fact, created a novation, and expressly

fixed in terms the date to be used in determining the basis of value.

(5) On page 5, the Government contends that in this proceeding the Court of Claims was without jurisdiction to give judgment to the claimant for $12,654.28, the amount of the appraisal made by a majority of the Board of Appraisers. Apparently Government's counsel bases this statement on his alleged premises that (a) the Ferries Company did not accept the appraisal of a majority of the Board, and (b) made no demand on the Government for the amount of such appraisal.

It is respectfully submitted that neither acceptance nor demand prior to the institution of this proceeding were conditions precedent to the right of the claimant to the lesser amount found by the majority of the Board to be owing, in the event that the appraisal were not set aside and the fair value determined by the Court of Claims in accordance with the contract of October 8, 1918.

WAIVERS.

The plaintiff makes no further contention that the appraisers were not "disinterested persons" as required by the terms of the lease, and no further contention that the failure of all five of the appraisers to join in an unanimous valuation would in itself vitiate the award.

On the other hand, the plaintiff contends that the appraisal was invalid by reason of appraisers' mistake in construing and applying the *contract* which submitted the matter to appraisal and defined the limits of the appraisal. *Low Estate Company* v. *Lederer Realty Co.*, 35 R. I. 352.

JURISDICTION OF THE COURT OF CLAIMS.

The plaintiff accepts the Government's interpretation of the existing decisions concerning the equity jurisdiction of the Court of Claims; namely, that the Court of Claims exercises a "limited equitable jurisdiction such as is ancillary and necessary to afford full relief in actions ex contractu."

In the instant case, the claimant's petition, and the findings of fact made by the Court of Claims, set forth the following fundamental elements of an action ex contractu, namely:

(a) An express contract by the Government to pay money to the claimant for property delivered to the Government by the claimant;

(b) An express contract for the ascertainment of the amount of this payment in a way specifically provided for in the contract; and

(c) The failure of the Government to pay.

The petition then proceeds to allege, and this allegation is supported by the findings of fact of the Court of Claims, that the method of determining the amount of money due the claimant from the Government, as defined in the contract, was not followed, was contrary to the rights of the claimant under the terms of the contract, and the petition thereupon invokes the equity jurisdiction of the Court of Claims as ancillary to its action ex contractu. Having invoked equity jurisdiction the plaintiff then proceeds to ask for complete relief and a money judgment against the United States for the fair value of its property.

The equity jurisdiction of the Court of Claims as applicable to this class of cases, simply requires that there must be a contract, express or implied, and the claimant must be entitled to a judgment for money. *United States* v. *Jones*, 131 U. S., 1.

Certainly the invocation of equity jurisdiction in the instant case is in accordance with the terms of Section 145 of the Judicial Code, the opinion of this court in *United States* v. *Jones*, supra, and clearly analogous to the decisions of this Court in *United States* v. *Milliken Imprinting Co.*, 202 U. S. 168; and *Wm. Cramp and Sons* v. *United States*, 216 U. S. 494.

LIMITATION OF APPRAISERS' POWERS.

Appraisers, whether acting upon a matter of public or private concern, must stay within the power granted

them; *Low Estate Co.* v. *Lederer Realty Co.*, 35 R. I. 352; *Omaha* v. *Omaha Water Company*, 218 U. S., 180. It is only when they stay within such power that a majority finding is binding, even in a matter of public concern. It plainly appears in the instant case that the majority appraisers wholly departed from the standard of values in contemplation of the parties, and provided for by the contract. They were charged with no duty and invested with no power of construction. The values ascertained by them, were found by the Court of Claims to have been predicated upon their departure from the grant of power (Findings VIII.) We can nowhere find that any court has held an appraisement, whether in a matter of public or private concern, to be valid and binding where the power of the appraisers was exceeded.

The case of *Omaha* v. *Omaha Water Company*, supra, impliedly recognizes that where such powers are exceeded even in a case where ordinarily a majority valuation would govern, the finding should be set aside.

It is respectfully submitted that this Court has repeatedly recognized the principle that when property has increased in value since it was acquired, the owner is entitled to the benefit of such increase on appraisal as of the time when the property is appraised, and in this connection the Court's attention is invited to the following extract from opinion of the Circuit Court of Appeals of the Eighth Circuit, in *City of Minneapolis* v. *Rand, et als*, 285 Fed. 818, 827:

> "In valuations of public utilities, there has been some doubt expressed by courts and commissions having the duty in charge, as to what importance is to be given to prices as affected by the conditions resulting from the war, as may be seen in a review of many cases in a note to Petersburg Gas Co. v. City of Petersburg, 20 A. L. R. 542, 589; but the rule established by the decisions of the Supreme Court of the United States, which have been cited is that the fair value at the time in question must be taken, and this rule has been applied, although the war and

its results have advanced prices far beyond the ordinary prices existing before the war. Potomac Electric Power Co. v. Public Utilities Com'n., 276 Fed. 327, 329, 51 App. D. C. 77; Consolidated Gas Co. of New York v. Newton (D. C.) 267 Fed. 231, 232, 234, 236; St. Joseph Ry., Light, H. & P. Co. v. Public Service Com'n. (D. C.) 268 Fed. 267, 269; Joplin and P. Ry. Co. v. Public Service Commission (D. C.) 267 Fed. 584, 587; City of Winona v. Wisconsin-Minnesota Light & Power Co. (D. C.) 276 Fed. 996, 1002; New York & Queens Gas Co. v. Newton (D. C.) 269 Fed. 277, 289; Elizabethtown Gas L. Co. v. Board of Public Utility Commissioners, 95 N. J. Law, 18, 19, 111 Atl. 729; Petersburg Gas Co. v. City of Petersburg (Va.) 110 S. E. 533, 20 A. L. R. 542.

"The gas company is entitled to the fair value of its property, even though that value has been increased as a result of the war, just as the laborer, the merchant, the manufacturer, the owner of land, and the lender of money may require the prevailing prices for what they furnish."

CONCLUSION.

It is respectfully submitted, therefore, that the findings of the Court of Claims called for the application of the equity jurisdiction, with which that Court is invested in aid of the claimant and a judgment in its favor for the net sum of $137,301.40 should have been entered; being the value of the property purchased by the United States under the contract *as of October 31, 1918*, the date fixed by the contract, as determined by the Court of Claims (Findings VIII.), over and above the agreed credits.

Respectfully submitted,

THE FERRIES COMPANY,
By Counsel.

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